IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1004 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BHIMSINH @ BHIMO S/O VELJI THAKOR

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR UR BHATT ADD.GOVERNMENT PLEADER for Respondents

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 01/05/98

ORAL JUDGEMENT

By this petition, under Article 226 of the Constitution of India, the petitioner who is the detenu, calls in question the legality and validity of the order of detention dt. 21st November, 1998 passed by the Commissioner of Police, for the city of Ahmedabad invoking his powers under Section 3(2) of the Prevention of Anti-Social Activities Act (hereinafter referred to as "the Act"), pursuant to which the petitioner has been

arrested and at present kept under detention.

2. In order to appreciate rival contentions, necessary facts may in brief be stated. The Commissioner of Police for the city of Ahmedabad came to know that instances of snatching of golden chains or other ornaments from the persons of the women passing through the public places were increasing and the people were not feeling secured while going out wearing the ornaments. He also found that about four complaints with Satellite and Ghatlodiya Police Stations were lodged against the petitioner. As alleged, in all the four cases, the petitioner is alleged to have committed the offence punishable under Sec. 392 read with Sec. 114 of I.P.Code by snatching away the golden chains and other ornaments from the persons of the people from the public places. The Police Commissioner also came to know that the petitioner was in succession committing the offences putting the persons in instant death or grievous hurt. The Police Commissioner wanted to inquire into. He preferred to record the statements of the persons knowing about the activities of the petitioner, but no one was ready to come forward and give the statement against the petitioner. Every one was feeling insecured and worrying about his own safety because every one was well aware of the retaliatory tendency of the petitioner. After great persuation and that too when the assurance was given that the particulars disclosing their identity would be kept secret, some of the persons showed their willingness to give the statements. Perusing the statements recorded, the Police Commissioner was satisfied to the fact that the petitioner was a head-strong person i.e. dangerous person within the meaning of Sec.2(c) of the Act because by his nefarious and subversive activities, he was terrorising the people and was disturbing the public order. Not only that he also came to know that numbers of offences in such manner, the petitioner was committing but because of fear of violence against them, the victims preferred not to lodge the complaint against the petitioner and thought it wise to put up with his terror or dread. The petitioner had, therefore, become more wicked, and subversive activities disturbing the public order were going berserk. It was absolutely necessary to curb such activities taking appropriate strict action, but it was found that any action, if taken under general law being too soft & sounding dull, would yield no result. The Police Commissioner, after studying the papers, found that the only way out was to pass the order of detention and detain the petitioner. In the result, the order in question came to be passed and the

petitioner came to be arrested and at present kept under detention.

3. While challenging the order, the petitioner has raised several grounds, but at the time of hearing, the learned advocate representing the petitioner tapered off his submissions, confining to the only point namely exercise of privilege under Section 9(2) of the Act, going to the root of the case. Both the parties, therefore, submitted on that point only. I will, therefore, confine to that point only and would not dwell upon the other points raised.

4. Before I proceed, it would be better if the law about privilege qua non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the

disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, w/o Ibrahim Abdul Rahim Alla Vs. State of Gujarat and Others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

5. In view of such law, the authority passing the detention order has to satisfy the Court that it was absolutely necessary in the public interest to suppress the particulars about witnesses keeping their safety in mind. It is also necessary to show that the authority applied his mind to the factors emerging on record. It is pertinent to note that in this case, no such affidavit is filed. It can, therefore, be said that without any just cause, the privilege is exercised. Reading the order, it appears that entrusting the task of inquiry whether the fear expressed by the witnesses was genuine or honest or imaginary or an empty excuse to the subordinate officer, whatever the subordinate officer reported has been accepted, because the detaining authority was having the full faith and trust in the subordinate officer. He assumed that everything might be in order and honestly reported. On such assumption, when the report is accepted which is not legally permissible, it can be said that without any application of mind, the privilege is exercised, and therefore, subjective

satisfaction is vitiated. In short, about non-disclosure when the privilege is exercised, the cause justifying the same is not made out. The petitioner, under the circumstances, was entitled to have those particulars so as to make effective representation and point out to the authority how those statements were not reliable. He was deprived of that right, and when his right to make effective representation is thus jeopardised, continued detention must be held to be unconstitutional & illegal.

6. For the aforesaid reasons, this petition is allowed. The order of detention dt. 21st November 1997, passed by the Police Commissioner for the city of Ahmedabad is hereby quashed and set aside. The petitioner-detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule accordingly made absolute.

(ccs)